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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. [redacted]

CHARLES BARTOLI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CHARLES BARTOLI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Charles Bartoli respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered below on March 10, 1971.

OPINIONS BELOW

The judgment and opinion of the United States District Court for the Northern District of Illinois is not officially reported. The opinion of the United States Court of Appeals for the Seventh Circuit entered on

March 10, 1971, is not yet officially reported and is printed as Appendix "A" to this petition.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the District Court was entered on March 10, 1971. A petition for a rehearing *en banc* was timely filed and was denied on May 10, 1971. A copy of the order denying the petition for a rehearing is presented as Appendix "B" to this petition. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether reliance upon hearsay testimony to obtain an indictment where better evidence is readily available violates a defendant's Fifth Amendment right to presentment and indictment by grand jury and his Sixth Amendment right to confrontation of witnesses; and whether this Court should, in the exercise of its supervisory powers, establish and promulgate standards governing the use of hearsay testimony before the grand jury.

2. Whether the government should be required to record and preserve the testimony of grand jury witnesses.

3. Whether the writ should be granted for the second reason, relating to improper limitation of impeachment of government witness Kay, urged by petitioners (and co-defendants) Aloisio and Jasinski (O. T. 1970, No. 1649).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty, without due process of law . . ."

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT

Petitioner Bartoli was named in three counts of an eight-count indictment charging petitioner and co-defendants Aloisio, Solomon, Cosentino, Murray, Jasinski, Carter and Davidson with conspiracy to violate the counterfeiting laws of the United States (18 U.S.C. § 371) (Count VIII), making, along with Carter, Davidson and Murray, of counterfeit obligations of the United States, in violation of 18 U.S.C. § 471 (Count IV), and with possession of a counterfeit obligation in violation of 18 U.S.C. § 474 (Count VII).

Co-defendant Cosentino was granted a separate trial and co-defendant Davidson pleaded guilty and was a government witness. All other defendants, except Carter, who was found not guilty, were convicted by a jury on all counts in which they were named. Petitioner and co-defendants Aloisio, Jasinski and Solomon appealed and the judgments of convictions were affirmed by the Court

of Appeals for the Seventh Circuit in the same judgment and opinion of which petitioner hereby seeks review.

The evidence adduced at the trial was the following. In August of 1967 co-defendant Grace Cosentino told Theodore Kay that she and her boy friend "Smokes" (Aloisio) were going to supply a friend of theirs with one and one-half million dollars of counterfeit notes and asked if he was interested in trying to sell the remainder of the notes. Kay expressed interest and they agreed to keep in touch. (Tr. 1342-43).

Kay, who was under indictment on an income tax charge which at the time of trial was still pending, reported the conversation to Special Agents of the Internal Revenue Service, and through them agreed to "cooperate" with Secret Service Agents. (Tr. 1399-1419.)

On October 7 co-defendant Davidson, a government witness, met with co-defendant Murray and began arrangements for printing the counterfeit obligations. (Tr. 105-115.)

On October 20, Bartoli, using the name "Charles H. Dowd," purchased one $10,000 and two $5,000 Treasury Notes from a bank in Chicago. (Tr. 481-84.) According to Davidson, some time during the middle of October, Murray met with him and showed him a piece of paper which looked like a Treasury Note. Davidson said he thought he could duplicate it and later did so. (Tr. 115-126.) Early in November, Bartoli sold the two $5,000 notes and two weeks later, sold the $10,000 note back to the bank from which they were purchased. (Tr. 484-93; 771-94.)

Davidson partially printed the notes, but told Murray the paper was not acceptable. It was decided to make a

complete new set of negatives, and Murray said he would have to obtain another copy of a note. (Tr. 129-141.) During this time, early in December, Cosentino, who was in the hospital, called Kay and told him that the printer was trying to be very careful and that they were trying to get a genuine certificate. Later that evening, she called Kay and then gave the phone to co-defendant Solomon who told Kay that the printer was trying to make a good product.

On December 6 or 7 Bartoli, again using the name of Dowd, purchased another $10,000 Treasury Note from the same bank. (Tr. 497-505.) The note was identified by Davidson as the note brought to him by Murray on December 15 which he used to make new negatives. (Tr. 143-44.)

On December 18, Secret Service Agent Ed Tucker drove Ted Kay to visit Cosentino, who showed him two sample counterfeit notes. She then placed a call to "Chuckie." Ten or fifteen minutes later, Bartoli arrived and was introduced to Kay as "Chuckie." Kay took the samples and gave them to Agent Tucker. (Tr. 1351-54.)

Just after New Years, 1968, Murray brought Davidson eight numbering machines and the counterfeit notes were numbered. (Tr. 166-69; 216-26.)

On January 11 Cosentino met Kay at the Chicago Airways Motel where she showed Kay a sample of the counterfeit obligations. She told Kay that she and "Smokes" were all set to print between five and ten million dollars worth of certificates, and they discussed the sale. (Tr. 1168-70; 1355-57.)

Agent Cozza picked up the sample from Kay and later that evening observed Bartoli meet Solomon in the Lincoln Hotel restaurant in Chicago. (Tr. 1172-75.)

After several attempts at making arrangements for the sale, Kay brought Agent Gibbs to the Airways Motel where he registered. Kay called Cosentino and arranged for her to meet Gibbs. That evening they met in Gibbs' room, during which time she showed him a sample note, and they discussed the terms of the deal. She related that one of her partners, "Chuckie," had purchased the genuine $10,000 note used in the process. She also mentioned "Smokes" who she said knew about the deal and could be trusted. (Tr. 1602-12.)

After Cosentino left, she was followed by Agents to the Hotel Lincoln where she joined Bartoli and Solomon. She then placed a phone call to Agent Gibbs and, during the call, was interrupted by a person whom she identified as "Chuckie." (Tr. 1612-13.) Other agents observed Bartoli standing next to her by the phone.

The following day she again discussed the sale with Gibbs, and again met with him at the motel. During this time she called "Smokes," who at approximately the same time was observed in a phone booth in another part of the city. (Tr. 874-77.)

That same evening co-defendant Solomon told Gibbs they were having trouble getting the "package" and would need $100,000 front money. Cosentino at this time told Gibbs that the counterfeiting venture had been "Chuckie's" idea. They arranged for delivery the following day on January 18. (Tr. 1622-25.)

The next day Cosentino, Solomon, Kay and Gibbs met at the motel. (Tr. 1363-64, 1626.) Later that day agents followed Solomon and Cosentino to the Lincoln Hotel where they met with Bartoli. Agent Tucker overheard part of a conversation relative to the deal. (Tr. 950-54.) In the afternoon, Cosentino called Gibbs and again ar-

ranged for delivery of the notes. She attributed delay to her partners and mentioned the name of "Chuckie" several times. (Tr. 1631-32.)

A few days later, on January 22, Solomon and Cosentino delivered a large quantity of $10,000 Treasury Notes to Gibbs at the motel room, where they were arrested. (Tr. 1635-41.)

Aloisio and Jasinski, who were parked in a car outside the motel, were also arrested. (Tr. 961.) One of the notes was found to contain the fingerprint of Bartoli. (Tr. 546-7.)

At the trial it was developed that the only trial witness who testified before the grand jury which returned the indictment was Agent Cozza. Request was made for a transcript of his grand jury testimony and the government disclosed that it did not have a court reporter present in the room during his testimony. A motion to dismiss the indictment was denied. (Tr. 1192-98.)

REASONS FOR GRANTING THE WRIT

1. This Court Should Consider And Decide Whether An Indictment Predicated Upon Hearsay Testimony Where Better Evidence Is Readily Available Violates The Fifth Amendment Right To Presentment And Indictment By Grand Jury And The Sixth Amendment Right To Confrontation, And Should Establish Standards Governing Hearsay Testimony Before The Grand Jury.

Petitioner respectfully urges that this Court grant the writ and consider and decide whether the indictment should have been dismissed because it was predicated largely, if not wholly, upon hearsay testimony. While ad-

mittedly, as recognized above by the lower court, this Court has previously, in *Costello* v. *United States,* 350 U.S. 359, refused to invalidate an indictment based on hearsay, it is respectfully requested that this Court review the Fifth Amendment right to presentment and indictment by a grand jury in the light of the opinions of lower courts challenging the wisdom of reliance upon hearsay where, as here, ". . . better evidence was readily available for presentation to the grand jury." *United States* v. *Arcuri,* 282 F. Supp. 347, 351 (E.D. N.Y. 1968); in view of the doctrine of *Brady* v. *Maryland,* 383 U.S. 73; and in view of other recent opinions exhibiting increased concern for the Sixth Amendment right of a defendant to confrontation of witnesses. (E.g., *Bruton* v. *United States,* 391 U.S. 123.)

A brief outline of the facts which by implication necessarily show the method by which the indictment was obtained is necessary to the understanding of this argument. The government's case against petitioner (and for that matter against all defendants except Murray) was established principally by the testimony of the two witnesses who dealt with the alleged conspirators—Ted Kay and Agent Gibbs—and to a lesser extent by the testimony of Agents Donald Tucker and Cozza who overheard conversations. Neither Kay nor Gibbs however testified before the grand jury which returned the indictment (Tr. 1645, 1679). The indictment was apparently obtained through the testimony of Agent Cozza who presumably testified from written reports prepared by himself. (Tr. 1192-94.)

It developed at the trial that Kay reported events orally to Cozza from time to time while he was operating as an informant for the Secret Service. (Tr. 1429-33.) Similarly,

Gibbs who dealt directly with the accused conspirators and who along with Kay was the most logical witness to present evidence to the grand jury, did not testify before the grand jury and recorded the events in written reports. (Tr. 1679-80.)

Cozza, presumably testifying from his compilation of hearsay reports, was the witness through whom the case was presented to the grand jury. True, Cozza had observed petitioner meet Solomon at the Lincoln Hotel, was present and in person overheard one conversation between Kay and Cosentino in the Airways Motel restaurant (Tr. 1157-69), but at no time was petitioner present or for that matter even mentioned by Kay or Cosentino. Importantly, the only individuals who could testify to conversations with petitioner or in his presence and who did so at the trial (Kay and Gibbs), were not called to testify before the grand jury. Save therefore for the fact that Cozza had observed petitioner meet Solomon, the case presented to the grand jury against him was necessarily entirely based upon "homogenized" hearsay and in numerous instances hearsay upon hearsay which was not recorded or preserved. *United States* v. *Arcuri,* 282 F. Supp. 347, 349.

The wisdom of requiring the government to obtain indictments upon something more than hearsay evidence is as obvious as it is important to the preservation of the grand jury system. At least two independent and sufficient reasons exist for giving the scope here urged to the Fifth Amendment requirement of ". . . presentment or indictment of a grand jury."

a) The function of the grand jury as a "screening agency;" and

b) The right of a defendant to "impeach by contraction."

a) The Grand Jury As A Screening Agency

Both of these reasons were recognized in what the Court of Appeals for the Second Circuit termed a "penetrating opinion" (405 F. 2d 691, 693) by Judge Weinstein, following a series of opinions by the Court of Appeals for the Second Circuit, in *United States* v. *Arcuri,* 282 F. Supp. 347, 349. The practice of relying upon hearsay rather than eye-witness testimony, observed Judge Weinstein, habituates the grand jury to rely upon "evidence which appears smooth, well integrated and consistent in all respects." Use of hearsay compounds the disadvantages of lack of cross-examination and absence of defense witnesses, with the result that grand jurors

> ". . . are unable to distinguish between prosecutions which are relatively strong and those which are relatively weak. All cases are presented in an equally homogenized form. A grand jury thus conditioned is unable to adequately serve its function as a screening agency. It cannot exercise its judgment in refusing to indict in weak cases where, technically a prima facie case may have been made out. It is, moreover unlikely to demand additional evidence." *United States* v. *Arcuri,* 282 F. Supp. 347, 349.

Judge Weinstein's decision in *Arcuri* was affirmed* by the Court of Appeals for the Second Circuit, *United States* v. *Arcuri,* 405 F. 2d 691 (2nd Cir. 1968). The court there reviewed the cases decided in that Circuit, quoting from the majority opinion of Judge Matterman in *United States* v. *Umans,* 368 F. 2d 725 (2nd Cir. 1966):

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*Although Judge Weinstein disapproved the use of hearsay, he refused to dismiss the indictment.

> "[E]xcessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecution that grand juries are supposed to afford the innocent. Hearsay evidence should be used only when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge." *United States* v. *Umans,* 368 F. 2d 725, 730.

To the same effect see *United States* v. *Beltram,* 388 F. 2d 449, 451 (2nd Cir. 1968) (Medina, dissenting).

Use of hearsay is of course more pernicious where the grand jury is not even informed that it is only hearsay which is being presented to it. Relying solely on hearsay without notifying the grand jury of this fact, Judge Medina observed in an earlier case, "makes a mockery of the Fifth Amendment guarantee." *United States* v. *Tane,* 329 F. 2d 848, 853-54 (2nd Cir. 1964). See also *United States* v. *Gramolini,* 302 F. Supp. 39, 42, where the court observed that ". . . the grand jury should be informed specifically and directly that it is hearsay evidence." (Whether or not the grand jury was so informed in the instant case of course cannot be determined because the government did not record and preserve the grand jury testimony.)

b) The Right To Impeach By Contradiction

Importantly incident to the Fifth Amendment right to ". . . presentment or indictment of a grand jury" is the related Sixth Amendment right to confrontation of witnesses. As observed by Judge Friendly in *United States* v. *Borelli,* 336 F. 2d 276 (2nd Cir. 1964):

> "The government ought not be allowed, by having its principal witness speak to the grand jury through the voice of another, to deprive a defendant of his right to impeach by contradiction." *United States* v. *Borelli*, 336 F. 2d 376, 391.

Use of grand jury minutes for impeachment purposes and correspondingly the importance of having eye-witness testimony before the grand jury gains in importance in view of the recent decisions of the Seventh and other Circuits, holding that grand jury testimony must be produced as a matter of right, without any showing of particularized need, for use by a defendant in cross-examination. *United States* v. *Amabile*, 395 F. 2d 47 (7th Cir. 1968), *United States* v. *Youngblood*, 379 F. 2d 365 (2nd Cir. 1967). Speaking directly to this use (i.e., for cross-examination) of grand jury minutes, Judge Medina recently observed:

> "What is the use of such a practice, established in the cause of truth and justice, if a prosecutor can in effect return to the old system by the simple expedient of withholding key witnesses from the grand jury hearing?" *United States* v. *Beltram*, 388 F. 2d 449, 451 (Medina, dissenting).

Amabile clearly intended to implement defendant's Sixth Amendment right to confrontation of witnesses. However, as Judge Medina so appropriately observed, where hearsay evidence is the basis for an indictment the *Amabile* ruling is finessed and defendant is denied his Sixth Amendment right to "impeach by contradiction." *United States* v. *Borelli*, 336 F. 2d 376, 391.

Defendant is of course aware that *Arcuri* did not hold unconstitutional the use of hearsay testimony before the grand jury, but limited its holding to situations where ". . . better evidence was readily available to the grand

jury." Moreover, the court in *Arcuri* declined to reverse defendant's conviction. In urging that this Court grant the writ, however, petitioner urges this Court adopt one of two positions: Either (1) hold that hearsay cannot be used to obtain an indictment; or (2) establish standards and allocation of burden of proof as to when an indictment will be dismissed by reason of the fact that it was obtained solely (or principally) on the basis of hearsay. Where hearsay is relied upon the government should be required to show, both by testimony and by production of the entire transcript of grand jury testimony, that:

1. The grand jury fully and adequately was informed that the testimony presented to it was hearsay;

2. The fact witnesses or ". . . better evidence was [not] readily available to the grand jury" *United States* v. *Arcuri*, 282 F. Supp. 347, 351; and

3. No prejudice resulted to defendant at the trial.

Absent such a showing by the government, the indictment should be dismissed.

In the instant case, petitioner respectfully submits that the indictment should have been dismissed as respects him because he has demonstrated that it was based upon the hearsay testimony of Agent Cozza and because the government, having failed to record his testimony,* necessarily cannot sustain the burden of showing that the grand jury was informed that the evidence presented to it was hearsay. See *United States* v. *Gramolini*, 302 F. 2d 39 (D.R.I. 1969).

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*Failure to record the grand jury testimony of Agent Cozza is the subject of a separate but related reason for granting the writ.

Accordingly, a writ of certiorari should issue to review the judgment of the lower court.

2. This Court Should Consider And Decide That The Government Must Record And Preserve The Grand Jury Testimony.

Petitioner urges this Court grant the writ and review the common practice of the government in refusing to record and preserve grand jury testimony. While the practice of failure to record and preserve grand jury testimony was approved by the lower court, as it has been in other Circuits (see cases cited at p. 3-A of the opinion of the lower court), petitioner respectfully urges this Court, in the exercise of its supervisory power over the lower federal courts, and in further implementation of the Sixth Amendment right to confrontation of witnesses, require that the grand jury testimony of all witnesses in the federal trial courts be recorded and preserved by the government.

Persuasive is the reasoning of Judge Pettine, holding that

> ". . . as a matter of federal law pursuant to Federal Rules of Criminal Procedure 57(b) that it is the law of this case grand jury proceedings should have been transcribed or otherwise equally effectively recorded." *United States* v. *Gramolini*, 301 F. Supp. 39, 42.

The court observed that recordation was the most effective restraint on potential abuses and resulting from the rapport which developed between the prosecution and the grand jury and equally importantly observed that keeping of minutes would have materially aided defendant's contention that he was prejudiced by ". . . presentation of the case exclusively by hearsay to the grand jury." (301 F. Supp. 39, 42.) Apparently in response to

a government argument, the court pointed out that the determination of prejudice and bias by a reconstruction of the events in an adversary hearing was inadequate by comparison with the means of keeping minutes.

Finally, petitioner respectfully submits that to the extent that grand jury minutes may be used for impeachment—the extent of course remaining unknown in the instant case—failure to record is tantamount to spoilation or destruction of evidence favorable to the accused in violation of the rule of *Brady* v. *Maryland,* 373 U.S. 83.

In short, several reasons exist for requiring recordation of grand jury minutes.

1. Recordation preserves the testimony for impeachment, thereby implementing decisions which require production of grand jury testimony (*Amabile, Youngblood*) and complying with *Brady* v. *Maryland.*

2. Recordation serves as a check on prosecutorial abuse of the grand jury by excessive use of hearsay, reliance on established rapport or other improprieties.

3. Should a question arise as to what occurred before the grand jury, recordation facilitates resolution of the question.

4. Finally, by use of electronic recording equipment, the cost is miniscule.

Petitioner therefore urges that the writ be granted and the judgment of the lower court reversed.

3. The Writ Should Be Granted For The Reason Urged By Petitioners Aloisio And Jasinski In Point II Of Their Separate Petition (O. T. 1970, No. 1649).

Petitioner Bartoli respectfully adopts and relies upon the reason urged by co-defendants and petitioners Aloisio and Jasinski as Point II in their petition for a writ of certiorari to review the judgment of the lower court already on file in this Court (O. T. 1970, No. 1649), wherein it was contended that petitioner's were denied their Sixth Amendment right to confrontation by reason of the trial court's limitation on impeachment of government witness Ted Kay.

CONCLUSION

For the reasons urged above, petitioner Bartoli respectfully prays that a writ of certiorari issue to review the judgment of the lower court.

Respectfully submitted,

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In The

United States Court of Appeals

For The Seventh Circuit

SEPTEMBER TERM, 1970 JANUARY SESSION, 1971

Nos. 17799-17802

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM ALOISIO, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 10, 1971

Before SWYGERT, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and CUMMINGS, *Circuit Judge.*

CUMMINGS, *Circuit Judge.* In July 1968 the four appellants and four others were indicted for conspiring to counterfeit United States Treasury Notes in the northern district of Illinois, commencing in September 1967, in violation of the general conspiracy provision found in 18 U.S.C. § 371. Bartoli was also charged in Count Two with forging 99 counterfeit United States Treasury Notes in Rockford, Illinois, in January 1968, in violation of 18 U.S.C. § 471. In Count Seven, he was charged with hav-

ing a counterfeit $10,000 Treasury Note in his possession on January 20, 1968, in Chicago, intending to sell it, in violation of 18 U.S.C. § 474. Jasinski was also charged with having the same Treasury Note in his possession in Chicago on January 16, intending to sell it, in violation of the same provision. Aloisio, Jasinski, and Solomon were named in three other counts concerning actions with respect to the 99 counterfeit $10,000 Treasury Notes, allegedly violating 18 U.S.C. §§ 472, 473, and 474. After a jury trial, the four appellants were found guilty as charged. Solomon and Bartoli received 10-year concurrent sentences on the substantive counts and five-year concurrent sentences on the conspiracy count; Aloisio and Jasinski received 5-year concurrent sentences. Having considered the various grounds urged for reversal, we affirm.

I. *The Validity of the Indictment.*

A. Use of Hearsay Evidence.

Defendants first challenge the validity of the indictment against them on the ground that it was based "largely if not wholly" upon hearsay testimony.

In *Costello* v. *United States,* 350 U.S. 359, the Supreme Court categorically refused to invalidate an indictment based upon hearsay evidence under either the Fifth Amendment or its supervisory powers over federal courts. This Court has repeatedly rejected similar attacks upon the quality of evidence relied upon by grand juries. See, *e.g., United States* v. *Daddano,* 432 F. 2d 1119, 1125 (7th Cir. 1970); *United States* v. *Braico,* 422 F. 2d 543, 545 (7th Cir. 1970). Nor is there any suggestion in this case that the "integrity of the judicial process" is jeopardized by the manner in which the Grand Jury reached its

determination. See *United States* v. *Leibowitz*, 420 F. 2d 39, 42 (2d Cir. 1969).

B. Failure to Preserve Testimony.

Defendants next ask that the indictment be dismissed because the Government failed to record and preserve the testimony of witnesses before the Grand Jury. They argue that such a requirement is necessary in order to implement the right of a defendant to access to a witness' grand jury testimony on subjects about which he subsequently testifies at trial. See *United States* v. *Amabile*, 395 F. 2d 47, 53 (7th Cir. 1968), certiorari denied, 39 U.S.L.W. 3361.

The basic rules relating to federal grand juries are set forth in Rule 6 of the Federal Rules of Criminal Procedure. Rule 6(d) presently permits, but does not demand, the presence of a stenographer for the purpose of recording evidence. This approach, though justifiably criticized on several grounds, have nevertheless been uniformly observed by other Circuits. See *Schlinsky* v. *United States*, 379 F. 2d 735, 740 (1st Cir. 1967); *United States* v. *Cianchetti*, 315 F. 2d 584, 591 (2d Cir. 1963); *United States* v. *Kind*, 433 F. 2d 339, 340 (4th Cir. 1970); *Baker* v. *United States*, 412 F. 2d 1069, 1073 (5th Cir. 1969), certiorari denied, 396 U.S. 1018; *United States* v. *Hensley*, 374 F. 2d 341, 352 (6th Cir. 1967); *United States* v. *Franklin*, 429 F. 2d 274, 276 (8th Cir. 1970); *United States* v *Ybarra*, 430 F. 2d 1230, 1233 (9th Cir. 1970); *McCaffrey* v. *United States*, 372 F. 2d 482, 484 (10th Cir-

1967), certiorari denied, 387 U.S. 945.[1] While we agree that the preservation of grand jury testimony is the wise practice, we are presently unwilling to bind the various district courts of this Circuit to such a practice. Rather, we will rely upon the individual district courts to exercise their local rule-making powers in this area pending any amendment to Rule 6(e) of the Federal Rules of Criminal Procedure.[2]

II. *Sufficiency of the Evidence as to Aloisio and Jansinski.*

A. Aloisio

At the inception of the conspiracy in August 1967, defendant Grace Cosentino, whose trial was severed, told

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1. The American Bar Association's Special Committee on Federal Rules of Procedure has, for the second time, recommended to the Supreme Court's Advisory Committee an amendment to Rule 6(e) of the Federal Rules of Criminal Procedure which would mandate recording of all testimony before an accusatorial grand jury. 51 F.R.D. ...., ...; see also 38 F.R.D. 95, 106.

2. Commendably, the United States District Court for the Northern District of Illinois has already adopted an appropriate rule to that effect:

> Local Rule 1.04(c). *Official Reporter to Attend Sessions of the Grand Jury.* An Official Reporter of this Court shall attend and record all testimony of witnesses appearing before every Grand Jury. Such record shall be filed with the Clerk of the Court and transcribed and released to the Court upon order or to the United States Attorney upon request and payment of the appropriate fees to the Official Reporter.

See *United States* v. *Gramolini*, 301 F. Supp. 39 (D. R.I. 1969), for a perceptive study of this problem.

informer Ted Kay that she and her partners were planning to counterfeit United States government securities, and that she and her boy-friend "Smokes," later identified as Aloisio, were going to supply an unidentified banker friend with $1,500,000 worth of such securities. On January 11, 1968, she told Kay that she and "Smokes" were all set with such securities for their banker friend. Kay agreed to supply her with a purchaser for some of the counterfeit Treasury Notes. Mrs. Cosentino agreed to have "Smokes" or Solomon present at the time of delivery to protect the proposed deal. Five days later, she reiterated to Kay, and Agent Gibbs that Solomon or "Smokes" would be present at the closing to protect all parties. Gibbs expressed some suspicion of "Smokes," but Mrs. Cosentino assured him that "Smokes" knew of the counterfeiting venture and could be trusted.

On the evening of January 17, Aloisio phoned Mrs. Cosentino's home from a restaurant and lounge at 1202 West Grand Avenue, Chicago. He told Mrs. Cosentino's daughter, Antonia, to call her mother and have her call him at HA 1-8760. Antonia relayed this message to her mother who was then in Agent Gibb's room in the Chicago Airways Motel. Mrs. Cosentino told Gibbs that her close friend "Smokes" was concerned about her and had just asked her, through Antonia, to call him at HA 1-8760. Mrs. Cosentino tried that number and received a busy signal. Thereafter, Aloisio again telephoned Antonia and told her that he had not yet heard from Mrs. Cosentino. Antonia then called her mother again, and Mrs. Cosentino told Gibbs that "Smokes" had called again and was concerned about her.

Thereafter, Mrs. Cosentino called HA 1-8760 from Gibbs' room. He overheard her say that "she was with

the man [Gibbs] at the motel room at that time, and was talking to him about the deal, and told this individual [Aloisio] that he had nothing to worry about; that I [Gibbs] was a gentleman, and she didn't see where anything could go wrong and told him not to worry." She also asked him where he was going to be later and told him that she would see him later that day. After she hung up, she told Gibbs "that was her friend Smokes who was very concerned about her." She stated that "he felt that the deal she was entering into with me [Gibbs] might be a setup, and that because he was such a close friend he was concerned about her welfare and didn't want her to get into any trouble." Over objection the foregoing testimony was admitted into evidence. It indicates that Aloisio was involved in the conspiracy as early as August 1967. Moreover, his telephone conversation with Mrs. Cosentino revealed his knowledge of the conspiracy and his concern for its success.

Through Antonia Cosentino and the telephone number testimony, the Government showed that Aloisio was the person to whom Mrs. Cosentino was talking from Gibbs' motel room. Accordingly, the testimony of Mrs. Cosentino's conversation with Aloisio was competent (*United States* v. *Bucur,* 194 F. 2d 297, 304 (7th Cir. 1952) and evidenced a conspiracy in which Aloisio was involved. The remainder of Mrs. Cosentino's statement to Gibbs was also admissible against Aloisio as a statement of a co-conspirator in furtherance of the conspiracy. Aloisio's January 22 appearance with Jasinski outside the motel, surveying the motel for about 30 minutes with the car motor on, corroborated Mrs. Cosentino's and Solomon's statements to Gibbs that morning that they had partners across the street covering the deal. We conclude that

there was ample evidence to link Aloisio with this conspiracy and to make him an aider and abettor as to the three substantive counts in which he was named.

B. Jasinski

On January 22, 1968, when Solomon and Mrs. Cosentino were delivering $1,000,000 in counterfeit Treasury Notes to Agent Gibbs in his motel room, they told Gibbs that two of their partners were across the street from the motel in an automobile for the protection of all concerned. At the same time, Agent Tucker had observed Jasinski and Aloisio watching the motel for about 30 minutes from their parked car with the motor on. Mrs. Cosentino's and Solomon's remarks to Gibbs clearly linked Jasinski and Aloisio to the scheme. Jasinski was also linked by his right thumbprint found on a "Saturday Evening Post" covering a sample of the counterfeit Treasury Notes that Mrs. Cosentino delivered to Gibbs on January 16. Since the conspiracy had already been established, this evidence, viewed in the light most favorable to the Government, sufficed to connect Jasinski with the conspiracy. The evidence also established his culpability as an aider and abettor of the commission of the substantive offenses with which he was charged.

III. **The Constitutionality of the Identification of Aloisio.**

Ted Kay, an unindicted coconspirator, began to cooperate with the Government in this investigation in September 1967. He, Solomon, and Mrs. Cosentino were arrested in Agent Gibbs' room at the Chicago Airways Motel on the morning of January 22, 1968. The Government has advised us that informer Kay was taken to the United States Marshal's lockup along with the other defendants for his own protection. At 11:00 a.m. in the

lockup, before being placed in a cell, Kay was with "some of the defendants" and John Varelli. In response to a question as to what Varelli said to Aloisio, Kay replied:

> "Well, the best I can recall, I remember him [Varelli] saying, 'Hi, Smokes.' And Smokes spoke back to him in Italian. I could understand a couple of the words, but I didn't recall the whole conversation. In Italian, he [Aloisio] said not to say anything."

Relying upon *Massiah* v. *United States*, 377 U.S. 201, defendant Aloisio now asserts that Kay's identification of him as "Smokes" should not have been admitted because the conversation ocurred in the federal lockup after his arrest without benefit of counsel.[3] We disagree.

The defendants did not show that the purpose of placing Kay in the cell in the Marshal's lockup was to obtain information for this case. Kay himself testified that the Secret Service did not tell him to overhear what might be said in the Marshal's office or in the lockup cells. He was placed in a cell by himself and had no idea how many people were in the adjoining cell except that Varelli was in it during part of the hour that Kay remained in his cell. The transcript does not reveal that Kay heard any conversations from other cells. Kay's subterfuge of being a codefendant had already been pierced, for, while standing in the lockup hallway with other apprehended persons, Aloisio saw Solomon kick Kay in the groin and later admonished Varelli in Italian "not to say anything." Kay was not placed in the lockup to limit admissions, nor was Varelli's knowledge of Aloisio as

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3. This objection was not made at the trial but will be considered in view of its constitutional nature. *Silber* v. *United States*, 370 U.S. 717 (*per curiam*).

"Smokes" deliberately elicited. In these circumstances, the admission into evidence of the volunteered statement of a non-defendant clearly did not vitiate Aloisio's conviction. *United States* ex rel. *Milani* v. *Pate,* 425 F. 2d 6 (7th Cir. 1970); *United States* ex rel. *Baldwin* v. *Yeager,* 421 F. 2d 182, 184 (3d Cir. 1970); *United States* v. *De Leo,* 422 F. 2d 487, 496 (1st Cir. 1970); certiorari denied, 397 U.S. 1037; *United States* v. *Mitchell,* 417 F. 2d 1246, 1249 (7th Cir. 1969); *United States* v. *Fioravanti,* 412 F. 2d 407, 413 (3d Cir. 1969); certiorari denied, 396 U.S. 837; cf. *Miller* v. *Carter,* 434 F. 2d 824, 825 (9th Cir. 1970).

IV. *The Suppression of Fingerprints.*

Defendant Jasinski urges that the fingerprints obtained from him after his January 22, 1968, arrest were subject to Fourth Amendment protection because his arrest was without probable cause. This objection was not made at the trial but may be considered here under Rule 52(b) of the Federal Rules of Criminal Procedure.

Even though the complaint against Jasinski was dismissed before his indictment, this record shows that there was probable cause for his January 22nd arrest. On the morning of January 22, in Agent Gibbs' room at the Chicago Airway Motel, Solomon and Mrs. Cosentino told Gibbs that they had two "partners" across the street covering the action, and Gibbs shortly thereafter so advised Agent Cozza. In turn, he communicated by radio to Agent Tucker on the street. Tucker told Cozza that Jasinski and Aloisio had been in the parking lot for half an hour seated in a car with the motor running and observing the motel. Theirs was the only car in the parking lot with anyone inside. Because of the information communicated to Gibbs by Mrs. Cosentino and Solomon,

and because of Aloisio's and Jasinski's suspicious behavior on the motel parking lot, Tucker had probable cause to arrest them that morning. Therefore *Davis* v. *Mississippi,* 394 U.S. 291, and *Bynum* v. *United States,* 262 F. 2d 465 (D.C. Cir. 1958), do not require the suppression of the fingerprints.

V. *Improper Reference to Photographs.*

Defendants Aloisio and Bartoli contend that they were denied a fair trial because references to their so-called "mug shots" informed the jury of their prior criminal records. We have carefully studied the three brief passages in the transcript concerning these photographs and note that the references were not elicited by the Government but occurred in cross-examination by defense counsel. Although the testimony revealed that the photographs were seen by Agents Sheriff and Tucker in the Chicago office of the Secret Service, they were merely described as bust photos with their names written on the reverse sides. The evidence did not disclose that these were "mug shots" or contained police numbers thereon, nor was there any mention of prior criminal activities of these two defendants. No reversible error resulted from the innocuous comments concerning the two photographs. *United States* v. *Robinson,* 406 F. 2d 64, 66 (7th Cir. 1969); *United States* v. *Schwartz,* 398 F. 2d 464, 470 (7th Cir. 1969).

VI. *Examination of Agent Tucker.*

Aloisio urges that reversal is required because of the following question asked by an Assistant United States Attorney:

"By Mr. Weber:

Q. Agent Tucker, going back to January 17th at 9:00 p.m., in the vicinity of Grace Cosentino's house,

what if any information did you have as to whether Mr. Aloisio was there on business or on pleasure?

Mr. Callaghan: Oh, objection.

* * *

The Court: The objection is sustained.

Mr. Weber: I have no further questions."

Aloisio's defense was that he was merely a social friend of Mrs. Cosentino. However, the Government was entitled to question that defense by asking Agent Tucker whether he had information that Aloisio's visit was indeed for business purposes, and government counsel was careful to phrase his question in the alternative. In any event, Aloisio's argument must fail, since the objection was sustained and the jury was instructed that it was to consider only properly admitted evidence.

VII. *Entrapment Instructions.*

Solomon contends that the trial judge should have given three proffered entrapment instructions. However, the evidence does not reveal that any government agent induced Solomon to commit this offense. In fact, on January 18, 1968, informer Kay offered Solomon an opportunity to avoid participation. The trial court was correct in ruling that there was no evidence of entrapment, so that entrapment instructions were inapposite.

VIII. *Comment on Defendants' Failure to Testify.*

Solomon and Aloisio assert that Agent Gibbs commented on their failure to testify. During his cross-examination by defendant Solomon, Gibbs was asked whether he was wearing his "mickey mouse" watch when he met Solomon on January 18, and Gibbs replied, "You will have to put on one of your clients to determine that

conclusion." No objection was made to this answer. The exchange occurred during the Government's case, when it was not known whether or not Solomon would take the stand. We do not view the remark as a comment on Solomon's failue to testify.[4] Moreover, the jury was properly instructed that a defendant has the right not to testify and not to draw any inference against him because of a failure to do so.

IX. *Cross-Examination of Informer Kay.*

Aloisio asserts that the defendants' rights were denied by the limitation of the cross-examination of informer Kay in three particular instances.

First, the district judge sustained the Government's objection as to whether Kay was guilty of filing false income tax returns. The defense was permitted to show that there was a pending indictment against Kay with respect to filing a false income tax return, thus permitting defendant to attack his credibility. As we noted in *United States* v. *Varelli*, 407 F. 2d 735, 751 (7th Cir. 1969), cross-examination on such matters is subject to a self-incrimination exception, so that the court's ruling was correct.

Because of Kay's Fifth Amendment rights, the district judge also properly sustained an objection as to whether Kay had transported a $100,000 bond in interstate commerce. Again counsel was permitted to demonstrate Kay's indictment for that offense as affecting his credibility.

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4. *United States* v. *Blassick*, 422 F. 2d 652, 654 (7th Cir. 1970).

In a belated attempt to show that the Government posted the informer's bond, Aloisio urges that Kay should have been permitted to say who put up his $50,000 bond. In light of the extensive examination of the witness on all other possible links with the prosecution, if still questioned, the district court's ruling that the question of the source of bond money was irrelevant was not an abuse of discretion. Moreover, Aloisio's own counsel's closing argument indicated that Kay's mother raised the money.

Our examination of the voluminous cross-examination of witness Kay convinces us that extremely broad latitude was allowed defense counsel. They were given great freedom in their efforts to show that Kay was a biased perjuror with obligations to the Government, and that his testimony had been "bought" by the Secret Service. His unsavory background was thoroughly explored by defense counsel. Kay denied that he was testifying in the present lawsuit in order to be freed of the income tax and stolen bond charges, and the jury was entitled to credit his denial. The strictures of *Varelli* and similar cases dealing with the scope of cross-examination were abundantly satisfied.

X. *The Prosecutor's Closing Argument.*

Aloisio and Bartoli assail the prosecutor's closing argument to the effect that (1) Kay's testimony was so well corroborated by Secret Service agents that the jury would have to disbelieve the prosecutor and agents if it disbelieved Kay, (2) it was not the Government's intention to send innocent men to the penitentiary, and (3) the Government was standing by its agents. These remarks are rather typical of the highflown rhetoric used in closing arguments by both sides. The prosecutor was

not impermissibly speaking of facts outside the record or within his own personal knowledge. In the context of his closing, he was referring to what was in the record and rebutting the attack of the defense on the integrity of the prosecution, including "the manufacturing of crime." The comments of government counsel were quite clearly provoked by the vigorous defense and do not merit reversal. *Long* v. *United States*, 355 U.S. 339, 359-360, note 15; *United States* v. *Battiato*, 204 F. 2d 717, 719 (7th Cir. 1953).

The judgments are affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

In The

United States Court of Appeals

For The Seventh Circuit

Chicago, Illinois 60604

May 10, 1971

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. OTTO KERNER, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. No. 17800 CHARLES BARTOLI, *Defendant-Appellant.*	Appeal for the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER

On consideration of the petition for rehearing *en banc*, and no member of the Court having requested that a vote be taken on the *en banc* suggestion.

IT IS ORDERED that the petition for rehearing *en banc* be denied.